The Application of Federal Rule of Civil Procedure 13(a) in *McDonald's Corp. v. Levine*

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INTRODUCTION

Under Rule 13(a) of the Federal Rules of Civil Procedure, a counterclaim is compulsory if it arises from the same transaction or occurrence comprising the subject matter of the original claim.¹ A party who fails to assert a compulsory counterclaim is barred from raising the claim in any subsequent, independent action.² In contrast, the Illinois Code of Civil Procedure has no compulsory counterclaim provision.³ Thus, any counterclaim omitted from an Illinois proceeding may be raised as a separate action in a later proceeding.

A recent Illinois appellate case, McDonald’s Corp. v. Levine,⁴ highlights the inconsistency between the federal and Illinois approaches. The plaintiff, McDonald’s Corp., brought a claim which could have been raised as a counterclaim in a pending

1. FED. R. CIV. P. 13(a) provides:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

In Helle v. Brush, 2 Ill. App. 3d 951, 953, 275 N.E.2d 688, 690 (1971), rev’d on other grounds, 53 Ill. 2d 405, 292 N.E.2d 372 (1973), the court defined a counterclaim as follows:

A counterclaim is in substance a complaint filed by defendant. It is not a defense on the merits. It is an independent cause of action and must be complete within itself. In short a counterclaim stands on the same footing, and is to be tested by the same rules, as if it were an independent action. (citations omitted).

2. In Switzer Bros. v. Locklin, 207 F.2d 483, 488 (7th Cir.), cert. denied, 347 U.S. 912 (1953), the court explained the effect of finding that a claim is compulsory, stating: “If the counterclaim is compulsory, it must be presented in connection with the main suit and, upon failure to do so, the claimant is barred from seeking the same relief in an independent action.” See also cases cited infra note 13.


federal proceeding. In determining whether plaintiff's claim should have been dismissed, the court addressed two issues: whether the claim was, by definition, a compulsory counterclaim under federal Rule 13(a), and, if so, whether it should be barred in the subsequent Illinois proceeding.

Resolution of the first issue was complicated by the fact that federal courts have never precisely defined what makes a counterclaim compulsory. This lack of a specific guideline allowed the Illinois court some discretion in determining whether the omitted claim was compulsory. After deciding that the claim was compulsory, the court then had to decide whether to apply the normal sanction under the federal rule and bar the claim. The Levine court held that the claim was compulsory and that it was barred in Illinois. The Illinois Supreme Court denied the plaintiff's petition for leave to appeal.

After a brief overview of the federal compulsory counterclaim provision and the counterclaim provision that is used in Illinois, this note will discuss McDonald's Corp. v. Levine and compare the Illinois appellate court's approach with the approaches used by other state courts. The note will conclude by proposing a standard Illinois courts should use to determine when an omitted counterclaim is compulsory under Rule 13(a) and when it should be barred in a subsequent Illinois proceeding.

BACKGROUND

Counterclaims in Federal Proceedings

Federal Rule of Civil Procedure 13(a) derives from former Equity Rule 30, although Rule 13(a) is broader in scope because

5. Federal courts have never precisely defined when a claim arises from the same “transaction or occurrence” to make it a compulsory counterclaim under FED. R. CIV. P. 13(a).

See infra notes 20-26 and accompanying text.

6. 108 Ill. App. 3d at 744, 439 N.E.2d at 483-84.


8. The portion of Equity Rule 30 devoted to counterclaims provided:

The answer must state in short and simple form any counterclaim arising out of the transaction that is the subject matter of the suit and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit both on the original and crossclaims.
it covers legal as well as equitable proceedings. Like its predecessor, Rule 13(a) is intended to eliminate multiple litigation of disputes that arise out of common matters. This purpose is achieved in two ways. Where a counterclaim is compulsory, a federal court will assert jurisdiction over the counterclaim under the doctrine of ancillary jurisdiction. Jurisdiction is proper even without an independent jurisdictional ground because the counterclaim relates to the same transaction or occurrence comprising the subject matter of the original claim. In addition,
the federal courts impose a sanction on a party who fails to assert a compulsory counterclaim by barring further litigation of the claim in any subsequent federal proceeding.\textsuperscript{13}

Federal Rule 13(b) governs in instances where a counterclaim is deemed permissive rather than compulsory.\textsuperscript{14} A permissive counterclaim does not arise out of the same transaction or occurrence as the original claim and may be omitted or asserted at the claimant's option.\textsuperscript{15} If the claim is not asserted, no sanction is imposed.\textsuperscript{16} A court, however, must have independent subject matter jurisdiction in order to hear a permissive counterclaim.\textsuperscript{17}

The distinction between compulsory and permissive counter-

\textsuperscript{13} Corp. v. Herbert Cooper Corp., 286 F.2d 631, 633 (3d Cir. 1961) (in an action to enjoin unfair competition under diversity jurisdiction, defendant's counterclaim founded on federal antitrust statutes was allowed even after original claim was dismissed for lack of diversity; plaintiff was then allowed to reassert original claim as compulsory counterclaim); Hospital Bldg. Co. v. Trustees of Rex Hosp., 86 F.R.D. 694, 695 (E.D.N.C. 1980) (counterclaims alleging abuse of process and defamation allowed in antitrust action); Automated Datatron, Inc. v. Woodcock, 84 F.R.D. 408, 412 (D.D.C. 1979) (in diversity action, counterclaim for recovery under a stock assignment agreement allowed although third party which destroyed diversity was joined).

\textsuperscript{14} FED. R. Civ. P. 13(b) states: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

\textsuperscript{15} See Hunter, \textit{One Year of Our Federal Rules}, 5 Mo. L. REV. 1, 9 (1940), where the author discusses the reasoning for distinguishing between compulsive and permissive counterclaims, rather than making all counterclaims of whatever nature compulsory.


\textsuperscript{17} Revere Copper Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970) ("a permissive counterclaim under Rule 13(b) requires an independent ground of federal jurisdiction since it does not arise out of the same transaction or occurrence as the original claim (citation omitted)"). Accord Harris v. Steinem, 571 F.2d 119, 122 (2d Cir. 1978); Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048, 1053 (4th Cir. 1976); Clark v. Universal Builders, Inc., 501 F.2d 324, 341 (7th Cir.), cert. denied, 419 U.S. 1070 (1974); Board of Educ. v. Admiral Heating & Ventilation, Inc., 511 F. Supp. 343, 344 (N.D. Ill. 1981).
claims becomes important when ancillary jurisdiction provides the basis for hearing the counterclaim and, further, when an omitted counterclaim is asserted in a subsequent action.\footnote{18}

The distinction between the two types of counterclaims turns on the question of whether the counterclaim arose “out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”\footnote{19} To determine whether a counterclaim is compulsory or permissive, therefore, the phrase “transaction or occurrence” must be defined. Rather than define the phrase precisely,\footnote{20} however, many courts have suggested applying standards or tests to determine whether a counterclaim is compulsory. Four such tests have been used:  

\begin{enumerate}
  \item If the issues of fact and law are the same in both the claim and counterclaim, the counterclaim is compulsory (identity of issues test).\footnote{21}
  \item If res judicata would bar a subsequent suit on defendant’s claim absent
  \item The courts, however, have not generally seen fit to note that there are two different, polar contexts in which the words “arising out of the transaction or occurrence” are called into play. One context is in the first litigation where the defendant, faced with substantive or procedural barriers to raise a counterclaim such as lack of jurisdiction of the subject matter or the statute of limitations argues that his claim overcomes the barriers and should be allowed because it is a compulsory counterclaim arising out of the transaction or occurrence. The plaintiff in this context argues that the claim does not so arise and that the barriers do apply. A different context is presented in the second litigation, when the defendant urges that the plaintiff’s claim is precluded because it was a compulsory counterclaim omitted in a prior litigation. The plaintiff in the second litigation then takes the position that his claim did not arise out of the prior subject matter, and the defendant argues that it did.
  \item See Kennedy, \textit{Counterclaims Under Federal Rule 13}, 11 \textit{Hous. L. Rev.} 255, 260-61 (1974), where the author discusses the difference between labeling a counterclaim compulsory in the first action as opposed to the second:
    \begin{quote}
      The courts, however, have not generally seen fit to note that there are two different, polar contexts in which the words “arising out of the transaction or occurrence” are called into play. One context is in the first litigation where the defendant, faced with substantive or procedural barriers to raise a counterclaim such as lack of jurisdiction of the subject matter or the statute of limitations argues that his claim overcomes the barriers and should be allowed because it is a compulsory counterclaim arising out of the transaction or occurrence. The plaintiff in this context argues that the claim does not so arise and that the barriers do apply. A different context is presented in the second litigation, when the defendant urges that the plaintiff’s claim is precluded because it was a compulsory counterclaim omitted in a prior litigation. The plaintiff in the second litigation then takes the position that his claim did not arise out of the prior subject matter, and the defendant argues that it did.
    \end{quote}
  \item Courts have not been able to precisely define “transaction or occurrence.” See, e.g., Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1925) (“transaction is a word of flexible meaning”); Williams v. Robinson, 1 F.R.D. 211, 213 (D.D.C. 1940) (“‘transaction’ and ‘occurrence’ probably mean whatever may be done by one person who effects another’s rights and out of which a cause of action may arise”). In addition, the phrase has been subject to an increasingly broad interpretation. Warshawsky & Co. v. Arcata Nat’l Corp., 552 F.2d 1257, 1261 (7th Cir. 1977); Albright v. Gates, 362 F.2d 928, 929 (9th Cir. 1966).
  \item \textit{See, e.g., Connecticut Indem. Co. v. Lee}, 168 F.2d 420, 423 (1st Cir. 1948) (claim by defendant insurer against defendant insured heard because claim arose from the same transaction or occurrence under the identity of issues test); Nachtman v. Crucible Steel Co. of America, 165 F.2d 997, 999 (3d Cir. 1948) (in action to obtain a patent, counterclaim attempting to enjoin plaintiff from exercising any rights under other patents held com-
a compulsory counterclaim rule, the counterclaim is compulsory (res judicata test). If substantially the same evidence relates to the plaintiff’s claim as well as to the defendant’s counterclaim, the counterclaim is compulsory (same evidence test). If there is any logical relation between the claim and the counterclaim, the counterclaim is compulsory (logical relation test).

None of these tests has escaped criticism. Critics of the identity of issues test point out that the actual issues of the suit often are not revealed until after the pleadings are completed. The res judicata test is considered too narrow, for under it a counterclaim would almost never be found compulsory. The same evidence test is also cited as too narrow since a counterclaim may be compulsory even though the evidence needed to prove the opposing claim may differ significantly. Conversely, the logical relation test has been described as overbroad and too uncertain in its application. Of the four tests, the logical relation test
is most often used by the courts. So long as a logical relation exists between a claim and counterclaim, the counterclaim will ordinarily be deemed compulsory, unless it falls within one of Rule 13(a)'s stated exceptions.

The sanction of barring an unasserted compulsory counterclaim from subsequent litigation, while accepted by the courts, is not expressly stated in the rule. In an effort to explain the rationale underlying the sanction, the courts have posited different theories. Most courts suggest that the bar arises from res judicata principles. This theory, however, requires a broad interpretation of the res judicata doctrine, which traditionally oper-

MINN. L. REV. 423, 442. See also Bose Corp. v. Consumers Union of United States, Inc., 384 F. Supp. 600, 603 (D. Mass. 1974) (the logical relation test can be uncertain in its application and overbroad in its scope).


Some courts have suggested that different tests may be preferable in different circumstances. See Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 625 (D.C. Cir. 1975) (counterclaim found compulsory under logical relation test rather than res judicata test because res judicata test was too narrow in this case); Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257, 1263 (7th Cir. 1977) (counterclaim compulsory under the logical relation test because other tests, helpful in some cases, were too restrictive in this case); Bose Corp. v. Consumers Union of United States, Inc., 384 F. Supp. 600, 603 (D. Mass. 1974) (counterclaim found permissive under the same evidence test; the logical relation test was not used because it was too vague in this case).

31. Rule 13(a) provides four exceptions where a counterclaim need not be asserted even if it definitely arose from the same transaction or occurrence as the original claim: (1) no counterclaim need be asserted if it was not mature at the time of serving the pleading; (2) no counterclaim need be asserted if it requires the presence of third parties over whom the court cannot acquire jurisdiction; (3) no counterclaim need be asserted if the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a judgment of that claim, and the pleader is not stating any counterclaim under Rule 13; and (4) no counterclaim need be asserted if, at the time of the action is commenced, the counterclaim is the subject of another pending action.

32. While the sanction is not stated in the rule, it was contemplated by the Advisory Committee. The original committee notes of 1937 to Rule 13 stated: "7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred."

33. Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967); International Bhd. of Elec. Workers v. G.P. Thompson Elec., Inc., 363 F.2d 181, 184 (9th Cir. 1966); United States v. Eastport S.S. Corp., 255 F.2d 795, 805 (2d Cir. 1958); Speed Prod. Co. v. Tinnerman Prod., 222 F.2d 61, 68 (2d Cir. 1955); Martin v. Morse Boulger Destructor Co., 221 F.2d 218, 222 (2d Cir. 1955); Switzer Bros. v. Locklin, 207 F.2d 483, 488 (7th Cir.), cert. denied, 347 U.S. 912 (1953).
ates to bar subsequent litigation between the same parties on the same cause of action, or on an issue already decided by the court.\textsuperscript{34} Because a counterclaim is based on a different cause of action than the original claim and usually involves different issues, traditional res judicata principles do not provide an adequate rationale.

Other courts suggest that the bar derives from a "waiver" or "estoppel" theory, which arises from the rule itself. The estoppel theory, supported by commentators\textsuperscript{35} as well as courts,\textsuperscript{36} appears more equitable than a res judicata theory because, under estoppel, the bar is not absolute. If a failure to bring the claim was excusable, the claim can still be asserted.\textsuperscript{37}

While courts frequently state that failure to raise a compulsory counterclaim results in subsequent preclusion, very few have actually barred claims in subsequent actions.\textsuperscript{38} One explanation

\textsuperscript{34} See 1B J. Moore, supra note 9, § 405 (1), at 178-80, where it states that the term res judicata ordinarily denotes two things respecting final judgment: first, that such a judgment is an absolute bar to a subsequent action between the same parties upon the same claim; and second, that the judgment constitutes an estoppel between the same parties as to matters that were litigated, although a claim in a subsequent action is different. This second principle is referred to as collateral estoppel. In Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955), the Court defined the difference between these two principles:

[\textit{U}nder the doctrine of res judicata, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.]

\textsuperscript{35} See Vestal, \textit{Claim Preclusion by Rule}, 2 Ind. Leg. F. 25, 43-44 (1968), where the author discusses the barring of omitted compulsory counterclaims. For support of the estoppel theory of precluding the counterclaim, see Wright & Miller, supra note 21, § 1417, at 96; Kennedy, supra note 18, at 250; Wright, supra note 21, at 260, 38 Minn. L. Rev. 423, 428.


\textsuperscript{37} See Dindo v. Whitney, 451 F.2d 1, 3 (1st Cir. 1971) (waiver or estoppel theory more appropriate where first case was settled rather than tried because defendant may not have known of right to counterclaim before settlement); Reynolds v. Hartford Accident & Indem. Co., 278 F. Supp. 331, 333 (S.D.N.Y. 1967) (waiver or estoppel theory preferable because it allows bringing of subsequent claim where first claim was handled by insurance company and no counterclaim was raised).

\textsuperscript{38} Only a handful of cases have barred a subsequent claim for failure to assert it as a compulsory counterclaim in a prior suit. See New Britain Machine Co. v. Yeo, 358 F.2d 397 (6th Cir. 1966) (claim brought by patent licensee to recover royalties paid without consideration barred because it was not asserted as a counterclaim in another federal
for this is that Rules 13(a) and (b) encourage parties to raise all related claims in the original action and thereby avoid the risk of later preclusion. Additionally, in the absence of a precise definition, courts have some flexibility in finding a counterclaim compulsory. Thus, a court may apply a more restrictive interpretation of "transaction or occurrence" when a bar would be inappropriate, and apply a liberal interpretation when the doctrine of ancillary jurisdiction is invoked so as to hear all related claims in one proceeding.

Although the majority of states follow the federal example and provide for compulsory counterclaims in some manner, many

action brought by assignees of a corporation for unlicensed use of a patent); Cyclops Corp. v. Fischbach & Moore, Inc., 71 F.R.D. 616 (W.D. Pa. 1976) (claim by manufacturer of an industrial machine against purchaser for costs of repairs barred when it should have been asserted as a counterclaim in an earlier proceeding brought by purchaser for costs and damages caused by the breakdown); Twin Disc. Inc. v. Lowell, 69 F.R.D. 64 (D. Wis. 1975) (claim alleging breach of employment contract barred because it was an omitted counterclaim in an earlier proceeding brought to recover on guaranty of employment contract); Kennedy v. Jones, 44 F.R.D. 52 (E.D. Va. 1968) (claim for injuries suffered in a collision barred because not asserted as a counterclaim in an earlier proceeding brought against the plaintiff and the plaintiff's employer over the same collision); Reconstruction Fin. Corp. v. First Nat'l Bank of Cody, 17 F.R.D. 397 (D. Wyo. 1955) (claim for fraudulent inducement to make loans to a sales company barred as to a defendant who had earlier sought to foreclose a lien against assets of the sales company where the plaintiff claimed an interest in the loans but raised no counterclaim). See also United States v. Eastport S.S. Corp., 255 F.2d 795 (2d Cir. 1958) (claim by U.S. for additional charter hire barred when it was not asserted as a compulsory counterclaim in an earlier Court of Claims proceeding brought by the defendant for interest owed by U.S.) (decided under Court of Claims rule 17(a) which is similar to Rule 13(a)).

39. Wright & Miller, supra note 21, § 1417, at 100; Wright, supra note 21, at 264-65, 38 Minn. L. Rev. 423, 432-33.

40. See Mercoid v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) (in patent infringement suit, counterclaim under § 4 of the Clayton Act for monopoly expansion of the patent was held permissive and therefore not barred in subsequent suit); Big Cola Corp. v. World Bottling Co., 134 F.2d 718, 723 (6th Cir. 1943) (in declaratory judgment action to find contract void, court held that an independent action could be brought for money due under the contract because the claim was not compulsory); Dundee Wine & Spirits, Ltd. v. Glenmore Distilleries Co., 238 F. Supp. 283, 289 (S.D.N.Y. 1964) (held that in an action for breach of a franchise agreement a counterclaim for goods sold and delivered was not compulsory).

All of these decisions have been criticized. See 3 J. Moore, supra note 9, § 13.13 nn. 22-23, at 13-76 to 13-78; Kennedy, supra note 18, at 286-83 nn. 29-31. Both authors criticize these decisions as being too restrictive an interpretation of "transaction or occurrence." Nonetheless, the cases reflect the tendency of courts to interpret the compulsory counterclaim provision more narrowly when a bar may result.

41. See Kennedy, supra note 18, at 260-63, for a discussion of the polarized interpretations of compulsory counterclaims.

42. States having some type of compulsory counterclaim are: Alabama (Ala. R. Civ. P. 13(a)); Alaska (Alaska R. Civ. P. 13(a)); Arizona (Ariz. R. Civ. P. 13(a)); Arkansas (Ark.
states consider the compulsory counterclaim unnecessary\(^{43}\) and make no such provision.\(^{44}\) Illinois is one state that does not compel counterclaims.

**Counterclaims in Illinois**

The Illinois Code of Civil Procedure\(^ {45} \) treats all counterclaims as permissive\(^ {46} \) because, as the Illinois Supreme Court has stated, a compulsory rule "might become most mischievous in its results, for [the pleader] might be wholly unprepared to make out his case for the want of testimony which at another time may be at his command."\(^ {47} \) This permissive posture does not mean all claims that could have been asserted as counterclaims may be litigated in subsequent proceedings. The doctrine of collateral estoppel

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\(^{43}\) The state of New York provides only for permissive counterclaims. N.Y. CIV. PRAC. R. 3019(a) (McKinney 1974). An advisory committee note to § 3019 states: "After consideration of the problem, the advisory committee decided that adoption of a compulsory counterclaim rule in New York might raise more difficulties than it would solve."

\(^{44}\) States without a compulsory counterclaim provision are: California (CAL. CODE CIV. PROC. § 2031, 2032 (West 1960 & Supp. 1983)); Connecticut (SUP. CT. (CIV.) R. 13(a)); Delaware (SUPT. CT. (CIV.) R. 13(a)); Florida (FLA. R. CIV. P. 11.170); Georgia (GA. CIV. P. ACT § 13 (1981)); Hawaii (HAWAII R. CIV. P. 13(a)); Idaho (IDAHO R. CIV. P. 13(a)); Indiana (IND. R. T. P. 13(a)); Iowa (IOWA R. CIV. P. 29); Kansas (KAN. STAT. ANN. § 60-213 (1976)); Kentucky (KY. R. CIV. P. 13.01); Maine (ME. R. CIV. P. 13(a)); Massachusetts (MASS. R. CIV. P. 13(a)); Minnesota (MINN. R. CIV. P. 13.01); Missouri (MO. R. CIV. P. 55.32(a)); Montana (MONT. R. CIV. P. 13(a)); Nebraska (NEB. R. CIV. P. 13(a)); Nevada (NEV. R. CIV. P. 13(a)); New Jersey (N.J. CIV. P. 13(a)); New Mexico (N.M. CIV. P. 13(a)); New York (N.Y. CIV. P. 2-608(a) (1981)); North Carolina (N.C. R. CIV. P. 13(a)); North Dakota (N.D. CIV. P. 13(a)); Ohio (OHIO R. CIV. P. 13(a)); Oklahoma (OKLA. STAT. tit. 12, § 272 (West 1975)); Rhode Island (R.I. R. CIV. P. 13(a)); South Carolina (S.C. CODE ANN. § 15-13-20 (1976)); South Dakota (S.D. COMP. LAWS ANN. § 15-6-13(a) (1967)); Tennessee (TENN. R. CIV. P. 13.01); Texas (TEX. R. CIV. P. 97); Utah (UTAH R. CIV. P. 13(a)); Vermont (VT. R. CIV. P. 13(a)); Washington (WASH. SUP. CT. R. 13(a)); West Virginia (W. VA. R. CIV. P. 13(a)); Wyoming (WYO. R. CIV. P. 13(a)).


\(^{46}\) ILL REV. STAT. ch. 110 § 2-608(a) (1981) states:

- Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in nature of set-off, recoupment, cross-claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross-claim in the action, and when so pleaded shall be called a counterclaim.

\(^{47}\) Ginther v. Duginger, 6 Ill. 2d 474, 480, 129 N.E.2d 147, 150 (1955).
will always operate to bar litigation of omitted counterclaims that deal with an issue resolved in prior proceedings.\(^4\) For example, in a suit for declaratory judgment of title, collateral estoppel will bar a subsequent action by the defendant for the money value of the property, assuming the defendant lost the original suit. This is because both suits would address the issue of rightful ownership of the property.\(^4\) Where the issues are not the same, however, estoppel is not invoked and the counterclaim may be heard.

Ordinarily, the difference between the Illinois and federal counterclaim rules is inconsequential because the rules apply in different jurisdictions.\(^5\) A problem does arise, however, if a counterclaim omitted from a federal proceeding is subsequently asserted in Illinois. The Illinois court must decide whether the claim was a compulsory counterclaim and, if it was, whether Illinois should follow the federal sanction and bar the claim. The Illinois Appellate Court confronted this problem recently in *McDonald’s Corp. v. Levine*\(^5\)

**McDONALD’S CORP v. LEVINE**

*McDonald’s Corporation filed suit in the Illinois Circuit Court of DuPage County against William S. Levine, Gene Himmelstein, and Stephen Haberkorn (all McDonald’s franchisees in*

\(^4\) IB J. Moore, *supra* note 9, § 441(2), at 729-30. See *supra* note 34 and accompanying text.


\(^5\) The two rules each operate in their own courts. The argument has been raised that under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in which the Supreme Court determined that federal courts are bound to apply state law in adjudicating nonfederal questions involving substantive rules of law, Rule 13(a) should not compel a counterclaim in a state that has no such rule when the counterclaim is not a federal question. This argument was rejected in *G & M Tire Co. v. Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 442 (N.D. Miss. 1964) where the court stated:

If plaintiffs’ reliance on *Erie* is taken as requiring this court to be bound by the [permissive] Mississippi counterclaim statute . . . it . . . must fail. While the various issues to which the *Erie* doctrine is applicable are not free from doubt, the one presented here is clearly one of procedure for the orderly administration of federal courts, and is not affected by the different but related rule established by the state for the orderly administration of its courts.

For a discussion of *Erie* and Rule 13(a) see generally Note, *The Erie Doctrine and Federal Rule 13(a)*, 46 Minn. L. Rev. 913 (1962).

Arizona), and their Illinois attorney. In its six-count complaint, McDonald’s alleged that the defendants had illegally recorded private conversations in violation of the Illinois Eavesdropping Act and had stolen certain privileged documents from McDonald’s corporate offices. These violations were alleged to have occurred during discovery proceedings in a prior antitrust action brought by the present defendants against McDonald’s in a federal district court in Arizona. At the time McDonald’s filed the state suit, the federal case was still pending. The Illinois Circuit Court dismissed all six counts of McDonald’s complaint. Two counts, count three alleging conspiracy and conversion and count four alleging use of stolen documents, were dismissed because they should have been brought as compulsory counterclaims in the federal proceeding.

On appeal, the Illinois Appellate Court for the Second District reinstated one of the counts previously dismissed because of the statute of limitations but affirmed the dismissal of the other five counts. As to counts three and four, the appellate court held that the claims should have been raised as compulsory counterclaims in the federal proceeding because they were logically related to the federal claims; the use of evidence in the federal proceeding was the violation charged in the state proceeding; and the claims all arose from the franchise relationship. As a result, the claims were barred.

McDonald’s petitioned for rehearing, claiming that federal Rule 13(a) was only a procedural rule and therefore had no extraterritorial effect. The corporation urged the court to follow state

54. The federal case was settled on August 11, 1983.
55. 108 Ill. App. 3d at 736-37, 439 N.E.2d 478-79. Counts I and II were dismissed because of the running of the statute of limitations. These two counts also included the claims of two McDonald’s employees who were allegedly damaged by the alleged eavesdropping violations. The claims were dismissed as to them because they were not real parties in interest. Court V’s dismissal was not dealt with by the court because it was not appealed. Count VI was dismissed for failure to state a cause of action.
56. 108 Ill. App. 3d at 736, 439 N.E.2d at 479.
57. Id. at 739, 439 N.E.2d at 480.
58. Id. at 745-46, 439 N.E.2d at 484-85.
59. Id. at 744, 439 N.E.2d at 483-84.
60. Id.
61. McDonald’s raised other issues as well in its appeal for rehearing. McDonald’s argued that because its claims were filed in Illinois while the federal action was still pending, even if it were a compulsory counterclaim it should not be barred because there
procedural rules and permit the claim. In rejecting this argument, the court held that Rule 13(a) was more than just a procedural rule. It could operate in either of two ways: either by defining the scope of the original action, thereby requiring the application of res judicata principles, or by setting up an estoppel against a party who did not comply with its terms, thereby bar-

was no judgment and, therefore, no res judicata principles could affect the subsequent claim. The court rejected this contention, holding that while some courts have reached this conclusion those decisions were inconsistent with the purpose of 13(a) since they permitted duplicative litigation. \textit{Id.} at 749, 439 N.E.2d at 487.

Rejecting this argument by McDonald's seems proper even if the court had determined that prior omitted counterclaims could be raised. While some state courts have refused to bar a claim that should have been raised as a compulsory counterclaim in a pending federal proceeding because res judicata principles did not apply (see, e.g., M.C. Mfg. v. Texas Foundries, 519 S.W.2d 269 (Tex. Civ. App. 1975), cert. denied, 423 U.S. 1052 (1976); Dixie Ohio Express Co. v. Eagle Express Co., 346 S.W.2d 30 (Ky. Ct. App. 1961); Hubbs v. Nichols, 296 S.W.2d 801 (Tenn. 1957)), this approach sets up a "race to judgment" in the two proceedings and is unwise. The better tactic is for the state court to abate the subsequent case pending the federal court decision. (See, e.g., Conrad v. West, 98 Cal. App. 2d 116, 219 P.2d 477 (1950) (court abated state action pending the outcome of the federal action)). This approach prevents the race to judgment and gives the first decision res judicata effect. Even if the second action were brought in a state court that did not bar omitted counterclaims, the prior decision may have collateral estoppel effect over the subsequent proceeding. Once the federal proceeding reaches judgment, the state is left to determine the issue \textit{Levine} addresses, namely, whether an omitted counterclaim from a prior federal proceeding should be barred. \textit{See also} Wright & Miller, supra note 21, § 1418, at 103-08; Note, Concurrent Jurisdiction as Affected by the Compulsory Counterclaim Rule, 10 Sw. L.J. 402, 409-12 (1956). \textit{See generally} Vestal, Reactive Litigation, 47 Iowa L. Rev. 11 (1961) (all supporting the abatement approach).

McDonald's also contended in its petition for rehearing that because it did not know of the alleged theft of the documents at the time it answered in the federal proceedings, these counterclaims could not have been compulsory. McDonald's argued that these claims fell within Rule 13(a)'s exception for claims not mature "at the time of serving the pleading." (See supra notes 1, 31). The appellate court rejected this claim, holding that because McDonald's had filed a counterclaim in the federal proceeding, it waived the Rule 13(a) exception. In the court's view, McDonald's should have asserted the entire claim as a compulsory counterclaim in the federal proceeding. 108 Ill. App. 3d at 749-50, 439 N.E.2d at 487. Furthermore, the court stated that the dismissal of the federal counterclaim in the federal court caused the claims to be barred by the doctrine of res judicata. \textit{Id.} Discussion of this holding is beyond the scope of this article.


\textit{See} Wright, \textit{supra} note 21, at 268-69, 38 Minn. L. Rev. 423, 435-36, where the author discusses this argument and the fact that while the rule is procedural, the effects of the rule are substantive and should have extra-territorial effect.

\textit{See also} Wright & Miller, \textit{supra} note 21, § 1417, at 101-02; Note, Failure to Plead Federal Compulsory Counterclaim as Bar to State Suit, 15 U. Chi. L. Rev. 446, 449-50 (1948) (while Rule 13(a) is a procedural rule, it lays down a new substantive rule of res judicata which bars assertion of omitted federal counterclaim in a state court). \textit{But see} Comment, \textit{Effect of Federal Compulsory Counterclaim Rule on Subsequent Ohio Action—Res Judicata}, 21 Ohio St. L.J. 251, 252-53 (1960) (conclusion that bar arises from res judicata avoids difficult problem of determining if the federal rule is one of procedure or sub-
riving a defendant from bringing the claim in any federal or state court.\textsuperscript{63}

McDonald's argument that the claims were not compulsory counterclaims was also rejected by the court.\textsuperscript{64} The court concluded that the district court in Arizona would have had to consider the manner in which the documents were obtained in order to determine the admissibility of their contents. Because the circumstances of acquisition were also central to McDonald's claims, the court held that the federal and state actions both involved the same evidence, and thus were logically related.\textsuperscript{65} Alternatively, the court held that the claims were logically related because they arose out of the franchisee relationship.\textsuperscript{66} McDonald's petitioned the Illinois Supreme Court for leave to appeal this decision, but leave was denied.\textsuperscript{67}

\textbf{DECISIONS FROM OTHER STATE COURTS}

In concluding that McDonald's claims should be barred, the Levine court relied on four decisions from other states involving counterclaims that were omitted from prior federal proceedings.\textsuperscript{68} While all four courts reached the same conclusion as the Levine court, the facts and rationales of the cases differ. Only five reported decisions have addressed this issue and each will be examined.\textsuperscript{69}

\textsuperscript{63} 108 Ill. App. 3d at 747, 439 N.E.2d at 485.
\textsuperscript{64} \textit{Id.}\ at 747-48, 439 N.E.2d at 486.
\textsuperscript{65} \textit{Id.}\ at 748, 439 N.E.2d at 486.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} McDonald's v. Levine, No. 81-151 (Ill. Sup. Ct. Feb. 1, 1983).

\textsuperscript{69} The cases discussed below all occurred in states that did not have compulsory counterclaim provisions at the time of the decisions. No reported decision from a state having its own compulsory counterclaim provision has confronted a claim that should have been asserted as a compulsory counterclaim in a federal proceeding. It is likely that such a claim would be barred since "it would seem reasonable to implement the public policy of both" federal and state rules by barring the claim. (Vestal, \textit{supra} note 35, at 51.) \textit{See also} Chapman v. Aetna Finance, 615 F.2d 361 (5th Cir. 1980) (federal court determined to bar a federal claim omitted as a compulsory counterclaim from a prior Georgia
A North Carolina court confronted this issue for the first time in *Jocie Motor Lines v. Johnson.* Jocie Motor Lines ("Jocie") sued Johnson to recover money it paid to Johnson pursuant to a district court order. The federal suit involved a traffic accident which occurred in Virginia. Johnson was sued because he owned the truck, and he joined Jocie, which had leased the truck from him at the time of the accident, as a codefendant. After Johnson and Jocie were found jointly and severally liable in the federal proceeding, Jocie brought suit against Johnson in North Carolina.

The North Carolina court held that the claim should have been brought as a compulsory counterclaim in the prior federal proceeding because the same transaction or occurrence gave rise to both claims. By failing to assert a timely counterclaim, the court reasoned, Jocie had lost its opportunity to recover any money from Johnson. The court held that the first judgment was res judicata on the issues that could have been raised, and that the federal court's decision must receive full faith and credit.

A Tennessee Appellate Court reached a similar result in *Meacham v. Haley.* Haley had filed a claim against the assets of a bankrupt corporation in a prior federal proceeding with Meacham the bankruptcy trustee. The bankruptcy court, in constructing a contract between Haley and the bankrupt corporation, held Haley's claim subordinate to the claims of other creditors because the contract lacked proper consideration. Rather than assert a counterclaim in the bankruptcy action, Meacham brought suit in Tennessee accusing Haley of fraud.

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state proceeding to further the policies of both courts). The issue addressed in *Levine* and the cited cases differs, however, because the policy of both courts is not being furthered by the bar.

70. 231 N.C. 367, 57 S.E.2d 388 (1950).
71. Hodges v. Johnson, 52 F. Supp. 488 (W.D. Va. 1943). Johnson was engaged in a trucking business in North Carolina, but had no certificate from the Interstate Commerce Commission permitting him to haul commodities in interstate commerce. Johnson entered into an agreement with Jocie Motor Lines, which did have such a certificate, to lease Jocie's trucks so as to haul under Jocie's certificate. Johnson never exercised any control over the operation of such trucks.
72. Id. at 492.
73. 231 N.C. at 371, 57 S.E.2d at 391.
74. Id. at 372, 57 S.E.2d at 391.
75. Id. at 373, 57 S.E.2d at 392.
76. 38 Tenn. App. 20, 270 S.W.2d 503 (1954).
77. Id. at 26, 270 S.W.2d at 505.
78. Id. at 26-27, 270 S.W.2d at 505-06.
In affirming the lower court's dismissal of Meacham's claim, the appellate court stated that the claim should have been asserted as a compulsory counterclaim during the bankruptcy proceeding because it arose from the same transaction or occurrence as the federal claim.\textsuperscript{79} The court barred Meacham's claim, invoking, as did the North Carolina court in \textit{Jocie}, res judicata principles.\textsuperscript{80} The \textit{Meacham} court added that estoppel principles also worked to bar the claim.\textsuperscript{81}

Another decision relied upon in \textit{Levine} was \textit{Horne v. Woolever} from the Ohio Supreme Court.\textsuperscript{82} Like \textit{Jocie}, the case involved an automobile accident that was the subject matter of an earlier federal suit.\textsuperscript{83} Woolever had sued Horne in federal court and, rather than assert a counterclaim, Horne brought suit in the state court. When the parties settled the federal court suit, Horne attempted to pursue his own state claim.\textsuperscript{84}

The Ohio court barred Horne's subsequent claim, holding that it should have been raised as a compulsory counterclaim.\textsuperscript{85} The court reasoned that Rule 13(a) has the effect of making a judgment on the merits res judicata to both the cause of action asserted in the petition and the cause of action that should have been asserted by the counterclaim.\textsuperscript{86} The court held that to the extent judgments are res judicata in the federal court, they are also res judicata in Ohio courts.\textsuperscript{87}

The final case cited for support in \textit{Levine} was \textit{London v. City of Philadelphia}.\textsuperscript{88} London sued in state court to recover damages for injuries he incurred in a traffic collision with a city vehicle. The city had already been sued in federal court by the passengers in London's automobile. London was joined as a third-party defendant in the federal proceeding, but did not raise a counterclaim against the city. He and the city were each found

\textsuperscript{79} Id. at 37, 270 S.W.2d at 510.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 38-39, 270 S.W.2d at 511.
\textsuperscript{82} 170 Ohio St. 178, 163 N.E.2d 373 (1959), cert. denied, 382 U.S. 951 (1960).
\textsuperscript{83} Id. at 179, 163 N.E.2d at 380. The prior federal proceeding was initiated by Woolever in an Ohio state court, but removed by Horne to the Northern District of Ohio. \textit{Id.}
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 183, 163 N.E.2d at 382-83.
\textsuperscript{86} Id. at 181, 163 N.E.2d at 381-82.
\textsuperscript{87} Id. at 183, 163 N.E.2d at 383. For a discussion of \textit{Horne}, see generally \textit{Subsequent Ohio Action, supra} note 62.
\textsuperscript{88} 412 Pa. 496, 194 A.2d 901 (1963).
fifty percent responsible for the collision.\textsuperscript{89} The Supreme Court of Pennsylvania barred the subsequent state claim,\textsuperscript{90} stating that although Pennsylvania courts are not bound by federal procedural rules, London’s claim was now res judicata, which was a matter of substantive law.\textsuperscript{91}

The courts in all four cases concluded that a compulsory counterclaim omitted in federal suits should be barred in subsequent state actions. One state court, however, has declined to follow the majority approach. The Mississippi Supreme Court, in \textit{Phoenix Co. v. Haney},\textsuperscript{92} allowed an omitted counterclaim against an insurance company to be asserted in state court. In a prior declaratory judgment action in federal court, the insurance company sought to establish that because Haney had violated the terms of his policy, coverage for fire damage to his property had lapsed.\textsuperscript{93} Haney raised no counterclaim in the federal proceeding.

When Haney asserted his claim in the state court, the insurance company argued that the claim was an omitted compulsory counterclaim and should be barred.\textsuperscript{94} Without deciding whether the claim was compulsory, the court found that res judicata did not apply because the issue of damages had never been litigated. The court stated that whether the claim should have been raised as a compulsory counterclaim in the federal proceeding was inconsequential.\textsuperscript{95} The United States Supreme Court denied certiorari in this case.\textsuperscript{96}

\textbf{ANALYSIS}

Of the preceding five decisions, the Mississippi court’s opinion is least persuasive and should not be followed.\textsuperscript{97} The Mississippi court rested its decision on res judicata principles alone without ever examining other possible rationales for barring the claim.

\textsuperscript{89} \textit{Id.} at 498, 194 A.2d 901-02.
\textsuperscript{90} \textit{Id.} at 498, 194 A.2d at 902.
\textsuperscript{91} \textit{Id.} at 498, 194 A.2d at 902-03.
\textsuperscript{92} 235 Miss. 60, 108 So. 2d 227, \textit{cert. denied}, 360 U.S. 917 (1959).
\textsuperscript{93} \textit{Id.} at 65, 108 So. 2d at 228.
\textsuperscript{94} \textit{Id.} at 66, 108 So. 2d at 229.
\textsuperscript{95} \textit{Id.} at 70-71, 108 So. 2d at 231.
\textsuperscript{96} 360 U.S. 917 (1959).
\textsuperscript{97} The \textit{Phoenix Co. v. Haney} decision has been criticized by commentators. See, e.g., Vestal, \textit{supra} note 35, at 54 (the decision “is clearly wrong and clearly inconsistent with the purpose of the compulsory counterclaim rule”); Comment, 73 \textit{Harv. L. Rev.} 1410, 1413 (1960) (Rule 13(a) defines the scope of the judgement to which the full faith and credit statue shall apply so the \textit{Phoenix Co.} decision was incorrect).
As subsequent courts and commentators have indicated, several persuasive reasons exist for such a bar. Apart from res judicata arguments, some have suggested that the bar derives from application of the "full faith and credit" statute. Under this law, the argument goes, the state court should accord the federal judgment full faith and credit by barring a claim that would be barred in the federal court. Others have supported the alternative theory suggested in Levine, that failure to raise the claim creates a personal waiver that follows a litigant wherever he attempts to sue. A fourth theory, based on the rule of comity, suggests that the state court follow the federal rule of excluding the claim out of deference and respect.

While the Levine court correctly decided to bar the omitted compulsory counterclaim, its conclusion with respect to which test to use is questionable. The court applied the logical relation test in concluding that McDonald's claim was a compulsory counterclaim. This test, which has been criticized as overly broad, proved too broad for the circumstances presented in Levine. Unlike the federal courts which use this test often to hear

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98. See, e.g., 108 Ill. App. 3d at 747, 439 N.E.2d at 485; Wright & Miller, supra note 21, § 1417, at 101-02; Wright, supra note 21, at 268, 38 Minn. L. Rev. 423, 435-36. See supra note 62 and accompanying text.

99. 28 U.S.C. § 1738 (1976) states:
The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the Clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

100. See, e.g., Vestal, supra note 35, at 51; Comment, supra note 97, at 1413. But see Chapman v. Aetna Finance, 615 F.2d 361, 363 (5th Cir. 1980) (federal court determined to bar a compulsory counterclaim omitted from an earlier Georgia proceeding under principle of comity; the rule is essentially procedural and not applicable under full faith and credit statute).

101. See, e.g., Wright & Miller, supra note 21, § 1417, at 102; Wright, supra note 21, at 268, 38 Minn. L. Rev. 423, 435-36.

102. A simple definition of comity was stated by the court in Doescher v. Estelle, 454 F. Supp. 943, 948 (N.D. Tex. 1978), appeal dismissed, 597 F.2d 281 (5th Cir. 1979): "Judi-comity is the principle in accordance with which courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation, but out of deference and respect."

103. See, e.g., Vestal, supra note 35, at 51.

104. 108 Ill. App. 3d at 743-44, 439 N.E.2d at 483-84.

105. See supra note 29 and accompanying text.
claims under their pendent jurisdiction,106 Illinois courts need consider the issue of whether a claim is compulsory only when deciding whether the claim must be barred. If an Illinois court were to impose this sanction whenever a subsequent claim bore some logical relation to a prior claim, the results would, indeed, be harsh. Even those federal courts which use the logical relation test apply it cautiously when the sanction of bar could result.107

Application of the logical relation test produces results which are contrary to Illinois' own procedural policy. Because Illinois does not have a compulsory counterclaim provision, Illinois courts ordinarily do not bar claims which could have been raised as a counterclaim in a prior state court proceeding. Use of a more restrictive test would therefore be more consistent with Illinois policy. Additionally, use of a more restrictive test would not violate federal policy because federal courts have recognized that different tests may be more applicable in different situations.108

The res judicata test, however, is inappropriate for Illinois courts for the same reason it is inappropriate in the federal courts: it is too restrictive.109 Res judicata principles apply regardless of whether a counterclaim is deemed compulsory. Thus, if this test were used, application of the federal rule would be totally unnecessary.110 The identity of issues test is also inappropriate. Under this test, a claimant could bring a subsequent claim that actually arose from the same “transaction or occurrence” as the original claim, as long as the claims involved different issues of law.111 In short, this test is not quite broad enough.

106. See WRIGHT & MILLER, supra note 21, § 1417, at 100, where the authors state that the great bulk of litigation concerning whether a particular claim is compulsory involves cases in which the claim has been pleaded, but a determination of whether it is compulsory is necessary because of the consequences that decision may have on questions of jurisdiction, venue, jury trial, right of removal, or appealability.
107. See supra notes 40-41 and accompanying text.
108. See supra note 30 and accompanying text.
109. See supra note 27 and accompanying text.
110. In Illinois, even though no counterclaims are compulsory, a subsequent claim will be barred if it involves the same issue decided in the prior suit under the doctrine of collateral estoppel. See supra notes 47-49 and accompanying text.
111. WRIGHT & MILLER, supra note 21, § 1410, at 44-45, states that a strict application of the identity of issues test would yield inconsistent results with many authoritative counterclaim decisions. As an example, Moore v. New York Cotton Exchange, 270 U.S. 593 (1926), is cited. In that case, the plaintiff's claim focused on the question of whether the defendants were violating the antitrust laws by refusing to give plaintiff ticker tape service, and the defendant's counterclaim focused on whether the plaintiff was purloining
RECOMMENDATION

Illinois courts should use the same evidence test. This test directly supports the purpose of Rule 13(a); it eliminates multiple litigation by barring those claims which would require one court to review the same evidence that another court previously examined. Furthermore, the test is consistent with Illinois policy. If it were used, fewer claims would be barred for failure to assert them as counterclaims. The same evidence test is also fair to litigants. It acts to bar claims that a litigator should recognize as compulsory counterclaims because the same evidence is directly involved. At the same time, however, the test does not act to bar claims that have only a tangential relation to the original claim. Finally, the same evidence test furthers principles of comity and full faith and credit by affording state courts a means to give as full a reading to the federal compulsory counterclaim rule as have federal courts.

Application of the same evidence test would have yielded consistent results in the foregoing state cases in which the issue of omitted counterclaims was actually examined. Three of these cases, Jocie Motor Lines v. Johnson, London v. City of Philadelphia, and Horne v. Woolever, involved claims arising from traffic collisions, and the evidence presented in each of the prior quotations from the defendant's exchange. Even though the issues were very different, the court held this counterclaim compulsory under Equity Rule 30 since it arose from the same transaction as the plaintiff's claim.

This authoritative case would have reached the same conclusion under the same evidence test. (See infra notes 112-13 and accompanying text). The plaintiff's antitrust claims for restraint of trade would have involved evidence of the plaintiff's alleged wrongful actions. This evidence would have been used by the defendant to show that it did not violate the antitrust laws when it refused to trade with the plaintiff. This evidence would also have supported the counterclaim. The court recognized this when it stated that the connection between the claim and counterclaim was so close that "it only needs the failure of the [claim] to establish a foundation for the [counterclaim]." Id. at 610.

112. For examples of counterclaims that were asserted under the logical relation test but that would have been barred under the narrower same evidence test, see Albright v. Gates, 362 F.2d 928 (9th Cir. 1966) (in a suit for slander over statements made regarding the plaintiff's sales of oil securities, defendants counterclaimed for amount paid for securities); G & M Tire Co. v. Dunlop Tire & Rubber Corp., 36 F.R.D. 440 (N.D. Miss. 1964) (in a suit alleging antitrust violations by plaintiff's supplier regarding defendants conspiring with other defendants to market products at lower prices than those charged to plaintiff, counterclaim by defendant for indebtedness arising from the business relationship between the plaintiff and defendant).

113. Several federal courts have applied the same evidence test. See supra note 24 and accompanying text.

114. See supra notes 71-72, 83-84, 89 and accompanying text.
federal actions focused upon who was at fault. The subsequent claims were correctly labeled compulsory because evidence involving fault would also have to be presented in the state courts.

The same evidence tests would produce identical results in *Meacham v. Haley*. There, the state court suit was based on fraud in a contract. Since the federal bankruptcy court had already examined the legitimacy of the contract, the state court correctly labeled the fraud claim a compulsory counterclaim because it involved the same evidence considered in the bankruptcy proceeding.115

Only in *Phoenix Co. v. Haney* would application of the same evidence test have permitted the state court plaintiff to proceed with his claim. In *Haney*, the insurance company initiated the federal action to determine whether the policy holder had violated the policy. In contrast, the state suit was brought by the policy holder for property damage suffered in a fire.116 Because evidence as to whether a policy holder violated his policy differed from evidence of fire damage, the Mississippi court could have permitted the claim under the same evidence test. Thus, the court's rationale for allowing the claim could have been that the claim was not compulsory. Instead, the court stated summarily that whether the claim was compulsory or permissive was inconsequential.

If the Illinois Appellate Court had applied the same evidence test in *Levine*, the claims most likely would have been heard. The federal claims involved evidence concerning McDonald's alleged antitrust violations, while the claims brought in the Illinois court involved evidence concerning the alleged theft of documents. Although the Illinois claims did arise out of evidence that was at issue in the federal proceeding, the evidence necessary to prove the state claims and the federal antitrust claims was quite different.117 Under the same evidence test, the state claim would not have been labeled compulsory and would not

115. See supra notes 77-78 and accompanying text.
116. See supra notes 93-94 and accompanying text.
117. The *Levine* court did come close to applying the same evidence test in its supplemental opinion on denial of rehearing. The court felt that the federal court would have considered the circumstances under which the documents were obtained in order to determine the admissibility and credibility of the evidence. The court stated that "[t]he fact that the two actions will involve the same evidence is one reason for treating the second action as a compulsory counterclaim." 108 Ill. App. 3d at 732, 439 N.E.2d at 486.

The *Levine* court was not applying the same evidence test, however. It cited to *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961) to support its
have been dismissed.\textsuperscript{118}

**CONCLUSION**

Illinois courts should bar claims omitted as compulsory counterclaims from prior federal proceedings. The principles of res judicata, comity, estoppel, and full faith and credit warrant this result. In addition, the goal of eliminating multiple litigation is furthered by applying Rule 13(a)'s sanction in other jurisdictions.

Since Illinois does not have a compulsory counterclaim rule, Illinois courts need not determine whether a counterclaim is compulsory except in situations where the claim was omitted from a prior federal proceeding. If Illinois courts were to use the relatively restrictive same evidence test, as opposed to the logical relation test, to make this determination, the results would be more equitable. They also would be more in keeping with Illinois' own policy not to bar subsequently asserted counterclaims, except under the doctrine of collateral estoppel.

If the same evidence test had been applied to the claims in *McDonald's Corp. v. Levine*, the court most likely would have concluded that the claims were not compulsory counterclaims. The Illinois Supreme Court, which declined to review this case, should address this issue at the next opportunity.

MARK E. SHURE

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\textsuperscript{118} This does not address the alternate theory presented in *Levine*, namely, that the claims were barred by res judicata. See supra note 61.